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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1035

STATE OF OHIO,
on the relation of
FRANKLIN ANDERSON, *et al.*,
Petitioners,

vs.

MERCEDES COTNER,
Clerk of Cleveland City Council, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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TABLE OF CONTENTS.

Opinion in the Court Below ---- 1

Jurisdiction ---- 2

Question Presented ---- 2

Constitutional, Statutory and City Charter Provisions Involved ---- 2

Statement of the Case ---- 4

Reasons for Granting the Writ ---- 8

Conclusion ---- 13

Appendix:

Charter of the City of Cleveland ---- 1a

Acknowledgment, August 29, 1967, by Mercedes Cotner of Receipt of Initiative Petition ---- 7a

Letter, August 31, 1967, Mercedes Cotner, Clerk of Council, to Franklin Anderson, et al. ---- 8a

Stipulation of City Charter Sections and Resolutions Adopted by Cleveland City Council ---- 9a

Opinion of the Supreme Court of Ohio in *State, ex rel. Rhodes vs. Bd. of Elections,* 12 Ohio St. 2d 4 (10/4/67) ---- 12a

From Relators' Petition for Writ of Mandamus 12a

From Relators' Brief to the Supreme Court of Ohio, Page 20 ---- 13a

From Relators' Reply Brief, Page 1 ---- 13a

Relators' Motion for Reconsideration ---- 14a

Decision and Order of the Supreme Court of Ohio, Case No. 41243 ---- 14a

Order of the Supreme Court of Ohio Denying Rehearing, Case No. 41243 ---- 14a

TABLE OF AUTHORITIES.

Cases.

Baker v. City of Cincinnati, 11 Ohio St. 534 (1860) 9

Cox v. Louisiana, 379 U. S. 536 (1965) 11, 12, 13

Farley v. Healey, S. F., 22567 (9/18/67) 10

James v. Ketterer, 125 Ohio St. 165, 180 N.E. 704 (1932) 6

State v. Hitt, 155 Ohio St. 589, 99 N. E. 2d 659 (1951) 8, 9

State, ex rel., Rhodes vs. Bd. of Elections, 12 Ohio St. 2d 4 1

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 11

Constitutions.

Constitution of Ohio:

Art. I, Sec. 2 3

Art. II, Sec. 1f 3, 8, 9

Art. XVIII, Sec. 3 3

Art. XVIII, Sec. 7 3

Constitution of the United States:

Amendment XIV 2, 8

Statutes.

Ohio Revised Code:

Sec. 731.28 ..... 4, 5, 6

Sec. 731.41 ..... 4, 6

28 U. S. C. 1257(3) 2

City Charter.

Cleveland City Charter 4

Chap. 1, Sec. 2 ..... 5, 6, 1a

Chap. 5, Sec. 31 ..... 1a

Chap. 5, Sec. 32 ..... 9, 1a

Chap. 5, Sec. 33 ..... 9, 2a

Chap. 7, Sec. 49-62 ..... 4, 5, 2a-7a

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioners, Franklin Anderson and four other residents of Cleveland, Ohio, ask that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on October 6, 1967 (Appendix 14a) denying petitioners' prayer for a writ of mandamus. A motion for reconsideration was denied on October 25, 1967 (Appendix 14a).

OPINION IN THE COURT BELOW.

This was an original action initiated in the Supreme Court of Ohio. The Court's opinion is set forth in Appendix 14a. As authority for its opinion the Court cited *State, ex rel., Rhodes vs. Bd. of Elections,* 12 Ohio St. 2d 4, which was decided on October 4, 1967. The opinion in the *Rhodes* case is reprinted in Appendix 12a.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on October 25, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3). Petitioners claim their rights were violated contrary to the Equal Protection Clause of Amendment XIV of the Constitution of the United States.

QUESTION PRESENTED.

Where the City Council of a municipality has a well established practice, spanning decades, of adopting resolutions dealing with national and international affairs, does the Clerk of that Council deny these petitioners, citizens of the municipality, the Equal Protection of Laws guaranteed by Amendment XIV to the Constitution of the United States when she rejects and refuses to process an initiative petition submitted by petitioners pursuant to the municipality's charter on the grounds that the resolution contained therein deals with subject matter which the municipality is not authorized by law to control by legislative action?

CONSTITUTIONAL, STATUTORY AND CITY CHARTER PROVISIONS INVOLVED.

United States Constitution.

Amendment XIV:

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution.

Article I, § 2:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Article II, § 1f:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Article XVIII, § 3:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Article XVIII, § 7:

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Ohio Revised Code.

731.28. Ordinances and measures proposed by initiative petition.

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. * * *

731.41. Charter municipal corporations.

Sections 731.28 to 731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures.

Cleveland City Charter.

Relevant sections of the Cleveland City Charter are set forth in Appendix 1a-7a.

STATEMENT OF THE CASE.

The City of Cleveland is a municipal corporation duly organized and existing pursuant to the laws of Ohio with its own Home Rule Charter. This Charter makes provision for an initiative and referendum as set forth in its chapter 7, §§ 49-62 (Appendix 2a-7a).

The petitioners are a group of duly qualified electors and residents of the City of Cleveland. Pursuant to § 49 of the Cleveland Charter, they constituted themselves a committee of petitioners for purposes of sponsoring the following initiative resolution:

Be It Resolved by the People of the City of Cleveland That:

The President of the United States Should Bring All American Troops Home From Vietnam Now So That the Vietnamese People Can Settle Their Own Affairs.

The Cleveland City Charter's initiative and referendum provisions, §§ 49 through 62 (Appendix 2a-7a), require 5,000 qualified electors of the city to sign an initiative petition. The petition is first submitted to the Clerk of Council who counts the signatures and certifies their sufficiency to City Council. Within 90 days of receipt of the petition, Council must vote on the initiative. If Council adopts the proposition submitted to it, the matter is concluded at that point. If, however, a majority of Council members vote the issue down or approve it in a form different from and unacceptable to the committee of petitioners, then the committee of petitioners may certify their intention to have the issue placed before the people of the City of Cleveland for a vote. Council is then required to put the issue on the ballot.

The Charter in § 49 speaks of ordinances as the subject matter of an initiative (Appendix 2a-3a). However, Chapter 1, § 2 of the Charter declares:

> "The enumeration of particular powers by this charter *shall not be held or deemed to be exclusive* but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have, and *may exercise all other powers which, under the constitution and laws of Ohio, it would be competent for this charter specifically to enumerate.*" (Emphasis added.)

Ohio Revised Code 731.28 authorizes the exercise of the initiative for ordinances "*and other measures.*" Under

this section of the Code, *resolutions* have been held to be the proper subject of an initiative petition.[1] Section 731.41 of the Code makes 731.28 inapplicable to those charter cities which have initiative and referendum provisions for "ordinances *and other legislative measures*" (emphasis added). Based upon this language and the sweep of § 2 of the Charter, the petitioners framed their initiative in the form of a resolution.

Petitioners and their supporters procured 9,954 signatures in support of their initiative resolution (Appendix 8a). On August 29, 1967, petitioners' petition containing the said signatures was duly submitted to and receipted by the Clerk of City Council (Appendix 7a-8a).

On August 31, 1967, the Clerk of Council, Mercedes Cotner, wrote petitioners and informed them that their initiative petition would not be processed "for legal reasons." (Appendix 8a-9a.)

On September 5, 1967, petitioners filed a mandamus action in the Ohio Supreme Court seeking an order requiring the clerk to count the signatures and determine their sufficiency. On October 6, 1967, the Court denied the writ.[2] Petitioners seek relief from this Court so that their initiative petition will be processed by the Clerk of Council and submitted to City Council, preparatory to a possible vote by the citizens of Cleveland. There is no issue

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[1] *James v. Ketterer*, 125 Ohio St. 165, 180 N.E. 704 (1932). The Court approved a resolution as the subject of an initiative petition. The procedure used was that set forth by state law rather than the one indicated by the initiative and referendum provisions contained in the Columbus City Charter. The Columbus Charter also spoke only of ordinances as the subject matter of an initiative but the enabling language of a broad enumeration of powers clause was *not* a factor in the case as it is here. In any event the initiators did not choose to make their effort under the Columbus Charter.

[2] Reconsideration was denied on October 25, 1967 (Appendix 14a).

of mootness under the charter with respect to the time such an election would be held since the initiative petition is not related to any specific election.

The City Council of Cleveland has a long established policy of adopting resolutions on national and international affairs. Among the numerous resolutions so adopted were five which were stipulated by counsel for petitioners and for the respondent Clerk (Appendix 9a-11a). The first of these parallels petitioners' resolution:

> Be it resolved by the Council of the City of Cleveland:
>
> That the president of the United States as commander-in-chief of the armed forces of the United States, be and he hereby is memorialized to take proper steps to insure the return of members of the armed forces to their homes and families as rapidly as is consistent with the safeguarding of the integrity and security of the United States of America; especially to insure the immediate return of said members stationed in China and other non-hostile parts of the world.

This resolution was adopted by City Council on January 21, 1946 (Appendix 9a-10a). Other resolutions deal with the affairs of countries in Eastern Europe, support for the Hungarian revolution of 1956, opposition to the abduction of Greek children in Greece, etc. All such resolutions are printed in the City Record of Cleveland at the expense of the taxpayers of the City of Cleveland. The denial of equal protection implicit in refusing to process initiative petitions in these circumstances was raised in the Supreme Court of Ohio (see Appendix 12a-14a, where the relevant sections of petitioners' pleadings, motions and briefs in the Supreme Court of Ohio are reproduced).

REASONS FOR GRANTING THE WRIT.

When a City Council uses the legislative powers conferred under the state constitution and City Charter to pass resolutions expressing its opinion on political issues outside its legislative jurisdiction, the right of citizens to initiate resolutions of the same generic kind under the initiative and referendum provisions of the constitution and charter cannot be denied without violating the Equal Protection Clause of the Fourteenth Amendment.

The Clerk of Council refused to process the petitioners' initiative petition for submission to City Council "for legal reasons" (Appendix 8a).

Article II, § 1f of the Ohio Constitution places a *floor* under the questions properly responsive to initiative by citizens of a municipality. It sets no ceiling. *State v. Hitt*, 155 Ohio St. 589, 99 N. E. 2d 659 (1951). In that case, it is said (p. 662):

> "* * * neither the Constitution of Ohio nor the statutes place any definite limitations on the use of the initiative."

In the *Hitt* case the Supreme Court of Ohio also announced the rule of construction operative in determining the breadth of the initiative power:

> "This and other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum *shall be liberally construed in favor of the power reserved* so as to permit rather than preclude the exercise of such power, and the object clearly sought to be obtained should be promoted rather than prevented or obstructed * * *." (Emphasis supplied.) 99 N. E. 2d at 662.

Furthermore, the same decision (99 N. E. 2d p. 663) made it plain that the initiative legislative power established by the Ohio Constitution was intended to create

a power to legislate coextensive with that of the city council:

> "In adopting the initiative and referendum provisions of Section 1f, Article II of the Constitution of Ohio, it was certainly not the intention of the people to leave the voters of a municipality powerless to override legislation which might be obnoxious to them. Even though the referendum is not available because an objectionable ordinance was passed as an emergency measure, perhaps arbitrarily, the initiative always remains as an authorized remedy. *Otherwise, the people* who elect the members of council and pay their salaries *would occupy a place below the council in legislative power. Surely such was not the design and purpose of Section 1f, Article II of the Constitution.*" (Emphasis added.)

Petitioners think the propositions of the *Hitt* decision are equally apposite when applied to resolutions of council and the right of initiative. For the language of Article II, § 1f of the Ohio Constitution authorizes initiative:

> "* * * *on all questions* which such municipalities may now or hereafter be authorized by law to control by legislative action; * * *." (Emphasis added.)

"All questions" undoubtedly includes resolutions[3] because "resolutions" are specifically contemplated by the legislative procedure section of the Cleveland City Charter (see § 32, Appendix 1a-2a). Both in that section and § 33 (Appendix 2a) specific references to the adoption of resolutions are made. This, in effect, recognizes Council's right to "control by legislative action," i.e., *by resolution,* the city's view of political questions. At any rate the unchal-

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[3] In construing the Constitution of Ohio, if a power of legislation is not limited or denied, it may be said to exist. *Baker v. City of Cincinnati*, 11 Ohio St. 534, 543 (1860). Nothing in the Ohio Constitution or in the Ohio Code suggests that Council acted illegally in adopting resolutions on political questions.

lenged interpretation (in practice) by Cleveland's City Council has put this gloss upon legislative action—and council having acted as it has, the initiative power cannot now be debased to embrace less legislative power than that "control" on "all questions" which the Ohio Constitution ordains.[4] Yet, Cleveland's Clerk of Council has so limited the initiative power and, in doing so, has raised a constitutional issue of federal dimension.

If the petitioners are barred from initiating a resolution dealing with national or international affairs on the grounds that such resolution is not "subject to control by legislative action," they and other Cleveland citizens will also be precluded from testing—through the referendum—any resolution adopted by City Council dealing with similar questions. As indicated above, Cleveland's City Council traditionally passes resolutions on issues *without regard to whether it "can control by legislative action" the subject matter of such resolutions.* Under the Ohio Supreme Court's holding in the instant case, a resolution adopted by council on a controversial international issue might be odious and obnoxious to Cleveland residents yet the citizens would be powerless to rescind such resolution through the referendum. It is this dichotomy of power and the denial of Equal Protection of law attending it which animates this petition.

It is axiomatic that Equal Protection of the law requires an even handed treatment of persons operating under the same legislative or constitutional grant of power. Perhaps Ohio need not have given legislative authority to its citizens in amounts equivalent to a municipal council's

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[4] Cf. *Farley v. Healey,* S. F. 22567 (9/18/67) at p. 6. The political resolutions adopted by the Board of Supervisors of San Francisco was a decisive factor in the California Supreme Court's decision ordering the Vietnam issue on the ballot in San Francisco.

legislative power. But the Constitution of Ohio and Charter did just that. To allow a municipal official to administer access to that grant of power to effect anything less than an even hand, *Yick Wo v. Hopkins,* 118 U. S. 356 (1886) effects an invidious discrimination, which cannot be purged of its discriminatory and, therefore, unconstitutional effects by the Ohio Supreme Court's simple rubric "not subject to legislative control."

To allow the holding of the Supreme Court of Ohio to stand is to suffer a contraction of constitutional liberty at variance with a recent decision of this Court. In *Cox v. Louisiana,* 379 U. S. 536 (1965), a civil rights leader heading a peaceful demonstration was arrested and convicted under "disturbing the peace," "obstructing public passages" and "courthouse picketing" (538) statutes. The conviction of particular relevance here is the "obstructing public passages" one. The record indicated that the statute—on its face broadly precluding all street assemblies and parades except labor picketing—in practice had not been so applied. Certain meetings and parades had been permitted in the city "even though they may have the effect of obstructing traffic, provided prior approval is obtained" (p. 556). In these circumstances the conviction was overturned. The thesis of reversal is particularly relevant here:

> "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." (pp. 557-558.)

Justice Black, concurring, developed the same constitutional proposition:

> "* * * I have no doubt about the power of Louisiana to bar all picketing on its streets and highways. * * * But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. * * * And *to deny this appellant* and his group *use of the streets* because of their views against racial discrimination, *while allowing other groups to use the streets to voice opinions on other subjects, * * * amounts, * * * to an invidious discrimination* forbidden by the Equal Protection Clause of the Fourteenth Amendment * * *." (p. 581.) (Emphasis added.)

The Clerk of Council's refusal to process the initiative petition involved here mounted precisely the same invidious discrimination condemned in *Cox*. For the effect of the refusal is to allow the city to pick and choose between the views of the council and its legislative equal—a group of citizens petitioning for initiative.

It is not necessary to decide whether council could refuse to pass resolutions and thus obliterate a comparable initiative right. The fact is it has chosen not to restrict itself thus quickening comparable rights in the initiators. The Clerk, therefore, violates the Equal Protection Clause as interpreted in *Cox v. Louisiana, id.*, when she denies citizens access to the initiated balloting contemplated by the Charter. A corollary consequence of great importance is the limiting effect on free expression.

CONCLUSION.

Arbitrary official action has been employed to discriminate invidiously between legislative equals in the exercise of legislative powers. This conduct offends the Equal Protection Clause of the Fourteenth Amendment and implicitly disregards the interpretation of that clause adopted by this Court in *Cox v. Louisiana, id.* The grant of a writ of certiorari will enable the Court to correct the discrimination, elaborate its view of the meaning and application of the Equal Protection Clause, and unblock a channel of free expression shut off by unconstitutional official action.

Respectfully submitted,

JACK G. DAY,
Counsel for Petitioners.

JACK G. DAY,
JERRY GORDON,
Of Counsel.

APPENDIX.

CHARTER OF THE CITY OF CLEVELAND.

Chapter 1.

§ 2 Enumeration of Powers Not Exclusive.

The enumeration of particular powers by this charter shall not be held or deemed to be exclusive but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have, and may exercise all other powers which, under the constitution and laws of Ohio, it would be competent for this charter specifically to enumerate.

Chapter 5.

§ 31 Clerk.

The council shall choose a clerk and such other officers and employes of its own body as are necessary. The clerk shall keep the records of the council and perform such other duties as may be required by this charter or by the council. All such officers and employes chosen by the council shall serve during the pleasure thereof.

§ 32 Legislative Procedure.

The council shall be the judge of the election and qualifications of its members. A majority of all the members elected shall be a quorum to do business, but a less number may adjourn from day to day, and compel the attendance of absent members in such manner and under such penalties as may be prescribed by ordinance. The affirmative vote of a majority of the members elected to the council shall be necessary to adopt any ordinance or resolution. The vote upon the passage of all ordinances, and upon the adoption of such resolutions as the council

by its rules shall prescribe, shall be taken by "yeas" and "nays" and entered upon the journal.

§ 33 Ordinance Enacted.

Ordinances and resolutions shall be introduced in the council only in written or printed form. All ordinances or resolutions, except ordinances making appropriations, shall be confined to one subject which shall be clearly expressed in the title, except as provided in the next section. Ordinances making appropriations shall be confined to the subjects of appropriation. No ordinance shall be passed until it has been read on three separate days unless the requirement of reading on three separate days has been dispensed with by a two-thirds vote of all the members of the council. The final reading shall be in full unless a written or printed copy of the measure shall have been furnished to each member of the council prior to such reading. The enacting clause of all ordinances passed by the council shall be "Be it ordained by the council of the city of Cleveland." The enacting clause of all ordinances submitted by the initiative shall be "Be it ordained by the people of the city of Cleveland."

Chapter 7.

Initiative and Referendum.

§ 49 The Initiative; Petition.

Any proposed ordinance may be submitted to the council by petition signed by at least five thousand (5,000) qualified electors of the city. All petition papers, circulated with respect to any proposed ordinance, shall be uniform in character and shall contain the proposed ordinance in full, and have printed thereon the names and addresses of at least five electors who shall be officially

regarded as filing the petition and shall constitute a committee of the petitioners for the purposes hereinafter named.

§ 50 Signing Petition.

Each signer of a petition shall sign his name in ink or indelible pencil, and shall place on the petition paper after his name his place of residence by street and number, or by other description sufficient to identify the place. The signatures to any such petition paper need not all be appended to one paper but to each such paper there shall be attached an affidavit by the circulator thereof stating the number of signers to such part of the petition and that the circulator believes each signature appended to the paper is the genuine signature of the person whose name it purports to be.

§ 51 Filing Petition.

All papers comprising a petition shall be assembled and filed with the clerk of the council as one instrument. Within ten (10) days from the filing of a petition the clerk shall ascertain whether it is signed by the required number of qualified electors. Upon the completion of his examination the clerk shall endorse upon the petition a certificate of the result thereof.

§ 52 Amending Petition.

If the clerk's certificate shows that the petition is insufficient he shall at once notify each member of the committee of the petitioners, hereinbefore provided for, and the petition may be amended at any time within fifteen (15) days from the date of the clerk's certificate of examination, by filing with the clerk an additional peti-

tion paper or papers in the same manner as provided for the original petition.

§ 53 Insufficiency of Petition.

Upon the filing of such an amendment the clerk shall, within ten (10) days thereafter, examine the amended petition and attach thereto his certificate of the result. If still insufficient, or if no amendment shall have been filed, the clerk shall file the petition in his offices and shall notify each member of the committee of that fact. The final finding of the insufficiency of a petition shall not prejudice the filing of a new petition for the same purpose.

§ 54 Submitting Proposed Ordinances.

When the certificate of the clerk shows the petition to be sufficient, he shall submit the proposed ordinance to the council at its next regular meeting and the council shall at once read and refer the same to an appropriate committee, which may be the committee of the whole. Provision shall be made for public hearings upon the proposed ordinance before the committee to which it is referred. Thereafter the committee shall report the proposed ordinance to the council, with its recommendations thereon, not later than sixty days after the date on which the proposed ordinance was submitted to the council by the clerk.

§ 55 Action on Proposed Ordinance.

Upon receiving the proposed ordinance from the committee, the council shall at once proceed to consider it and shall take final action thereon within thirty (30) days from the date of such committee report. If the council reject the proposed ordinance, or pass it in a form different

from that set forth in the petition, the committee of the petitioners may require that it be submitted to a vote of the electors in its original form, or that it be submitted to a vote of the electors with any proposed change, addition or amendment, which was presented in writing either at a public hearing before the committee to which such proposed ordinance was referred, or during the consideration thereof by the council.

§ 56 Ordinance, Form, Voting.

When an ordinance proposed by petition is to be submitted to a vote of the electors the committee of the petitioners shall certify that fact and the proposed ordinance, in the form in which it is to be submitted to the clerk of the council within ten (10) days after the final action on such proposed ordinance by the council.

§ 57 Ordinance, Certification, Submission For Vote.

Upon receipt of the certificate and certified copy of the proposed ordinance, the clerk shall certify the fact to the council at its next regular meeting. If an election is to be held not more than six months nor less than thirty (30) days after the receipt of the clerk's certificate by the council, such proposed ordinance shall then be submitted to a vote of the electors. If no such election is to be held within the time aforesaid, the council may provide for submitting the proposed ordinance to the electors at a special election to be held not sooner than thirty days after the receipt of the clerk's certificate. If a supplemental petition, signed by five thousand (5,000) qualified electors, in addition to those who signed the original petition, be filed with the clerk asking that the proposed ordinance be submitted to the voters at a time indicated in such petition, the council shall provide for a special election at such time. The

sufficiency of any such supplemental petition shall be determined, and it may be amended, in the manner provided for original petitions for proposing ordinances to the council. If no other provision be made as to the time of submitting a proposed ordinance to a vote of the electors, it shall be submitted at the next election.

§ 58 Repealing Ordinances.

Proposed ordinances for repealing any existing ordinance or ordinances in whole or in part may be submitted to the council as provided in the preceding sections for initiating ordinances. Initiated ordinances adopted by the electors shall be published and may be amended or repealed by the council as in the case of other ordinances.

§ 59 The Referendum.

No ordinance passed by the council, unless it be an emergency measure, shall go into effect until forty (40) days after its final passage by the council. If at any time, within said forty (40) days a petition signed by electors equal in number to ten per cent (10%) of the total vote cast at the last preceding regular municipal election of the city be filed with the clerk of the council requesting that any such ordinance, or any specified part thereof, be repealed or submitted to a vote of the electors, it shall not become operative until the steps indicated herein have been taken. The petition shall be prepared and filed in the manner and form prescribed in the foregoing sections of this charter for an initiative petition for an ordinance.

§ 60 Petition for Referendum.

When such a petition is filed with the clerk of council he shall determine the sufficiency thereof in the manner provided in this charter for an initiative petition for an

ordinance. If the petition be found sufficient, or be rendered sufficient by amendment as provided in sections 52, 53 and 54 hereof, the clerk shall certify that fact to the council, which shall proceed to reconsider the ordinance. If, upon such reconsideration, the ordinance be not entirely repealed the council shall provide for submitting it to a vote of the electors, and in so doing the council shall be governed by the provisions of sections 57 and 66 hereof respecting the time of submission and manner of voting on ordinances proposed to the council by petition.

§ 61 Petition For Referendum, Text.

Referendum petitions need not contain the text of the ordinances, the repeal of which is sought, but they shall be subject in all other respects to the requirements for petitions submitting proposed ordinances to the council.

§ 62 Ordinances.

Ordinances submitted to the council, by initiative petition and passed by the council without change, or passed in an amended form and not required to be submitted to a vote of the electors by the committee of the petitioners, shall be subject to the referendum in the same manner as other ordinances.

ACKNOWLEDGMENT, AUGUST 29, 1967, BY MERCEDES COTNER OF RECEIPT OF INITIATIVE PETITION.

I, Mercedes Cotner, Clerk of Council of the City of Cleveland, hereby acknowledge receipt from the Vietnam Resolution Committee of an Initiative Petition entitled "Be it resolved by the people of the City of Cleveland that:

THE PRESIDENT OF THE UNITED STATES SHOULD BRING ALL AMERICAN TROOPS HOME FROM VIETNAM NOW SO THAT THE VIETNAMESE PEOPLE CAN SETTLE THEIR OWN AFFAIRS" consisting of 560 number of pages alleged to contain 9954 number of signatures.

MERCEDES COTNER,
City Clerk,
Clerk of Council.

LETTER, AUGUST 31, 1967, MERCEDES COTNER, CLERK OF COUNCIL, TO FRANKLIN ANDERSON, ET AL.

CITY OF CLEVELAND

CITY HALL

August 31, 1967

Franklin Anderson, 9701 Lamont Avenue, Cleveland, Ohio
Evelyn Blackburn, 1727 East 116th Place, Cleveland, Ohio
Kathleen Geathers, 1485 East 107th Street, Cleveland, Ohio
Rev. John Roberts, 6205 Lawn Avenue, Cleveland, Ohio
Auda Romine, 1330 West Boulevard, Cleveland, Ohio

Dear Ladies and Gentlemen:

I have received a number of petitions presented by you as electors representing the Vietnam Resolution Committee requesting that the question of United States participation in the Vietnam War activities be presented to Council of the City of Cleveland as an initiative petition.

Upon the advice of Bronis J. Klementowicz, Director of Law, and Daniel J. O'Loughlin, Chief Counsel, of the City of Cleveland, I must respectfully decline for legal reasons to process the petitions submitted by you as an initiative petition. Should you desire the return of the

documents submitted by you, they will be available upon request at my office.

Very truly yours,
MERCEDES COTNER,
Clerk of Council,
City of Cleveland.

MC:o

Xeroxed Copy: Mr. Jerry Gordon, Standard Building, Cleveland, Ohio

STIPULATION OF CITY CHARTER SECTIONS AND RESOLUTIONS ADOPTED BY CLEVELAND CITY COUNCIL.

Preliminary Statement.

It is agreed by and between the undersigned attorneys for the relators and respondent Mercedes Cotner that:

* * * * *

2. The resolutions adopted by City Council of Cleveland and quoted in pertinent part below are accurately quoted. Relevancy and materiality of these resolutions are in issue.

RESOLUTIONS PASSED BY CITY COUNCIL:

(1) Resolution Number 207-46, p. 107 of the City Record Adopted January 21, 1946.

> An emergency resolution memorializing the president of the United States as commander-in-chief of the armed forces of the United States to take proper steps to insure the return of members of the armed forces to their homes and families as rapidly as is consistent with the safeguarding of the integrity and security of the United States of America.

The principal resolving clause provides:

Be it resolved by the Council of the City of Cleveland:

That the president of the United States, as commander-in-chief of the armed forces of the United States, be and he hereby is memorialized to take proper steps to insure the return of members of the armed forces to their homes and families as rapidly as is consistent with the safeguarding of the integrity and security of the United States of America; especially to insure the immediate return of said members stationed in China and other non-hostile parts of the world.

(2) Resolution Number 511-50, p. 444 of the City Record Adopted March 8, 1950.

Resolution protesting the abduction of Greek children by the Communistic guerillas of Greece.

The principal resolving clause provides:

Be it resolved by the Council of the City of Cleveland:

That this Council: Protests the unlawful abduction and forcible detention of these innocent children, whose relatives and friends have contributed much to the culture and growth of this community.

(3) Resolution Number 888-51, p. 1160 of the City Record Adopted June 4, 1951.

An emergency resolution memorializing Congress, the President and Selective Service Director Lewis D. Hershey to disapprove and repeal the regulation deferring college students who attain certain grades, or pass special aptitude tests, from military service.

The principal resolving clause provides:

Be it resolved by the Council of the City of Cleveland:

That this Council hereby memorializes Congress, the President of the United States, and Selective Service Director Lewis D. Hershey to disapprove and repeal the regulation deferring college students who attain certain grades, or pass special aptitude tests, from military service.

(4) Resolution Number 2412-56, p. 2161 of the City Record Adopted October 31, 1956.

A resolution expressing support for the Hungarian people in their struggle against Communism.

The principal resolving clause provides:

Be it resolved by the Council of the City of Cleveland:

That this Council express and record its support for the Hungarian people in their struggle against Communism and offer the hope that soon Hungary will take its rightful place among the free nations of the world.

(5) Resolution Number 619-66, p. 604 of the City Record Adopted March 14, 1966.

The principal resolving clause provides:

Be it resolved by the Council of the City of Cleveland:

That this Council records its support for the Byelorussian People in their struggle against Communism and expresses its hope that the Republic of Byelorussia will take its rightful place among the free nations of the world.

JERRY GORDON,
Attorney for Relators.

DANIEL J. O'LOUGHLIN,
Chief Counsel,
Attorney for Respondent
Mercedes Cotner

OPINION OF THE SUPREME COURT OF OHIO, STATE EX REL. RHODES vs. BD. OF ELECTIONS, 12 OHIO ST. 2d 4 (10/4/67).

Per Curiam. This is an action in mandamus originating in this court. By this action, relators seek to compel the respondent Board of Elections of Lake County to place the following resolution proposed by initiative petition on the ballot:

"Be it resolved by the people of the Village of Willoughby Hills, Ohio, that:

"The President of the United States should bring all American troops home from Vietnam now so that the Vietnamese people can settle their own affairs."

Section 1f, Article II, of the Ohio Constitution, provides for municipal initiative and reads as follows:

"The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which *such municipalities may* now or hereafter *be authorized by law to control by legislative action*; such powers shall be exercised in the manner now or hereafter provided by law." (Emphasis added.)

The initiative petition in the instant case does not contain any question which a municipality is authorized by law to control by legislative action.

Writ denied.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

FROM RELATORS' PETITION FOR WRIT OF MANDAMUS.

10. Relators say that the action of the respondent Clerk of Council in rejecting the said initiative, in refusing to count the signatures to the petition and in refusing to ascertain their sufficiency so as to certify the

issue to City Council, is arbitrary, unreasonable, illegal, and in violation of the City Charter of Cleveland, the Constitution of Ohio and the Constitution of the United States.

11. Relators have no plain and adequate remedy in the ordinary course of the law, and unless the writ prayed for herein is issued, relators and those who signed the said petitions will be deprived unjustly, arbitrarily and illegally of their rights under the City Charter of Cleveland, the Constitution of Ohio and the Constitution of the United States to have the said initiated resolution submitted to a vote of City Council of Cleveland as petitioned for, and, in the event of rejection by City Council, to the voters of the City of Cleveland.

FROM RELATORS' BRIEF TO THE SUPREME COURT OF OHIO, PAGE 20.

III. *Denial of relators' right to place the said resolution before Cleveland City Council, and in the event of Council's rejection thereof then before the voters of the City of Cleveland, would violate the Equal Protection clause of Amendment XIV to the Constitution of the United States.*

[Text Omitted.]

FROM RELATORS' REPLY BRIEF, PAGE 1.

THE 14TH AMENDMENT ISSUE

In their main brief, relators advanced as a central argument the contention that deprival of Equal Protection of the Laws was the unavoidable consequence of respondent's arbitrary action in refusing to process relators' initiative petition. The Court is respectfully urged to note respondent's cursory reply to this contention (p. 20, respondent's brief). The issue is dealt with in a single para-

graph where the claim is made that the resolutions adopted by Cleveland City Council on national and world affairs "are neither relevant or material."

[Remainder of Text Omitted.]

RELATORS' MOTION FOR RECONSIDERATION.

Relators respectfully move the Court for an order granting reconsideration of the above cause for the reason that momentous constitutional issues are involved, particularly with respect to the Equal Protection of the Laws Clause of Amendment XIV of the United States Constitution, issues not dealt with by the Court in its opinion in *State, ex rel. Rhodes v. Board of Elections of Lake County,* 12 Ohio St. 2d 4. See *Cox v. Louisiana,* 379 U. S. 536 (1965).

DECISION AND ORDER OF THE SUPREME COURT OF OHIO, CASE NO. 41243.

(Entered October 6, 1967.)

This cause originated in this Court upon the filing of a petition for a writ of Mandamus by the Relators and was heard in the manner prescribed by law. On consideration thereof, the writ is hereby denied on authority of *State, ex rel. Rhodes, v. Board of Elections of Lake County,* 12 Ohio St. 2d 4.

It is further ordered that the Respondents recover from the Relators costs expended in this Court.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING, CASE NO. 41243.

(Entered October 25, 1967.)

It is ordered by the court that rehearing in this case is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1035.

STATE OF OHIO,
on the relation of
FRANKLIN ANDERSON, *et al.*,
Petitioners,

vs.

MERCEDES COTNER,
Clerk of Cleveland City Council, *et al.*,
Respondents.

BRIEF OF RESPONDENT, MERCEDES COTNER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

I. Opinions ---------- 1

II. Preliminary Statement ---------- 2

III. Question Presented ---------- 3

IV. Statement of the Case ---------- 3

V. Argument. Reasons Why the Writ Should Be Denied ---------- 5

1. A proposed initiative resolution relating to the war in Vietnam does not pertain to any matter which a municipality has the power to regulate by legislative action. Therefore, under the Constitution of the State of Ohio, such resolution is not the proper subject for exercise of the initiative ---------- 5

2. The people of Cleveland in adopting their Charter have recognized the basic distinction between an ordinance and a resolution and have chosen to limit the application of the initiative procedure to those matters which would be the proper subject for legislation in ordinance form ---------- 9

3. The record presents no evidence to substantiate a claim that respondent violated any principle of uniformity protected by Amendment XIV of the United States Constitution 17

Conclusion ---------- 19

TABLE OF AUTHORITIES.

Cases.

Beachwood, Village of, v. Board of Elections, 167 Ohio St. 369 (1958) ---------- 7

Campbell v. Cincinnati, 49 Ohio St. 463 (1892) ---- 10

Cleveland, City of, v. Piskura, 145 Ohio St. 144 (1945) ---------- 8

Cox v. Louisiana, 379 U. S. 536 (1965) ---------- 18

Dillon v. City of Cleveland, 117 Ohio St. 528 (1927) 15

Fitzgerald v. Cleveland, 88 Ohio St. 338 (1913) ---- 7

Gibson, W. B., Co. v. W. M. Housing Authority, 65 Ohio App. 84 (1940) ---------- 10

James, on behalf of City of Columbus, v. Ketterer, 125 Ohio St. 165 (1932) ---------- 13

State, ex rel. City of Mansfield v. Lowery, 32 Ohio Ops. 2d 481 (1964) ---------- 10

State, ex rel. Devine v. Hoermle, 168 Ohio St. 461 (1959) ----------14, 16

State, ex rel. Rhodes v. Board of Elections of Lake County, 12 Ohio St. 2d 4 (1967) ---------- 1, 6

State, ex rel. Sharp v. Hitt, 155 Ohio St. 529 (1951) 7

United States v. Burnson, 339 U. S. 87 (1950) ------9, 18

Wuebker v. Hopkins, 29 Ohio App. 386 (1928) ---- 10

Constitutions.

Constitution of the United States:

Amendment XIV ----------3, 9, 17

Constitution of Ohio:

Art. II, Sec. 1f ----------1, 3, 5, 6, 8, 9, 18

Art. XVIII, Sec. 3 ----------6, 7, 8, 16

Art. XVIII, Sec. 7 ----------6, 7

Statutes.

Ohio Revised Code:

Sec. 731.28 ---------- 14, 15, 17
Sec. 731.41 ---------- 14, 15, 17

City Charter.

Charter of the City of Cleveland:

Sec. 1 ---------- 15, 16
Sec. 2 ---------- 16
Sec. 31 ---------- 17
Sec. 32 ---------- 12, 13
Sec. 33 ---------- 12, 13
Sec. 49 ---------- 10
Chap. 7, Secs. 49 through 62 ---------- 3, 5
Sec. 54 ---------- 11
Sec. 55 ---------- 11
Sec. 56 ---------- 11
Sec. 57 ---------- 11
Sec. 58 ---------- 11

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1035.

STATE OF OHIO,
on the relation of
FRANKLIN ANDERSON, *et al.*,
Petitioners,

vs.

MERCEDES COTNER,
Clerk of Cleveland City Council, *et al.*,
Respondents.

BRIEF OF RESPONDENT, MERCEDES COTNER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS.

This action originated in the Supreme Court of Ohio wherein a writ of mandamus was sought. The decision and order of that Court denying the writ, was entered October 6, 1967 and is set forth on page 14a of the appendix to petitioners' brief. The authority for the court's decision and order was *State, ex rel. Rhodes v. Board of Elections of Lake County,* 12 Ohio St. 2d 4 (1967). The opinion in this latter case is predicated upon an interpretation of Section 1f, Article II [1] of the Ohio Constitution and such opinion may be found in full on page 12a of the appendix to petitioners' brief.

[1] The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

II.

PRELIMINARY STATEMENT.

This action in mandamus was filed as the result of the refusal of the respondent, Clerk of Council of the City of Cleveland, Ohio, to process a proposed initiative resolution to mandate the President of the United States to bring all American troops home from Vietnam.

Petitioners are the five members of a committee which circulated and presented to said Clerk of Council the initiative petition in question. Respondent, Mercedes Cotner, is the Clerk of Council of the City of Cleveland and is the individual required by Charter of the City of Cleveland to initially act upon the petition presented by petitioners.

The remaining respondents are members of the Board of Elections of Cuyahoga County, Ohio. A demurrer has been filed in their behalf and sustained by the Supreme Court of Ohio.

For the purposes of this brief, the Citizens' Committee will be referred to as "petitioners," Mercedes Cotner as the "respondent," and "Charter" shall mean the Charter of the City of Cleveland, Ohio. We make no mention of the Board of Elections of Cuyahoga County, since we consider its demurrer to be well taken and also because said Board is not a necessary party for the defense raised by respondent Cotner. All emphasis is that of the respondent unless otherwise indicated.

III.

QUESTION PRESENTED.

Does the Constitution of the State of Ohio or the Charter of the City of Cleveland sanction either the subject matter or the form of the initiative presented to the respondent for processing and did her refusal deprive petitioners of any right protected by Amendment XIV of the Constitution of the United States?

IV.

STATEMENT OF THE CASE.

The facts in this case are not in dispute and the questions presented are readily resolved by judicial interpretation of the meaning of Section 1f, Article II of the Ohio Constitution and Chapter 7, Sections 49 through 62 of the Charter of the City of Cleveland. As previously noted, the text of the Constitutional provision may be found on page 1 of respondents' brief, *supra*. The Charter provisions are fully set forth on pages 2a through 7a of the appendix to petitioners' brief.

The petitioners as duly qualified electors of the City of Cleveland presented an initiative petition to the respondent who under the Charter was charged with the official responsibility of processing a valid initiative petition to ascertain whether or not it contained the signatures of 5,000 duly-qualified electors of the City. By the terms of the Charter, respondent is given ten days to validate the signatures with the Board of Elections of Cuyahoga County, Ohio. If respondent finds that the petition contains sufficient signatures, she certifies the proposed initiative legislation to the Council for its action. The Council must then act on the matter within a specified time sequence. If the proposed legislation is approved, the matter

is terminated. If Council disapproves or amends the legislation in a manner unsatisfactory to petitioners, the Charter establishes a procedure by which petitioners can have the matter placed on the ballot at either a regular or special election.

The initiative petition presented to respondent consisted of some 560 pages and allegedly containing 9,954 signatures which, if valid, would exceed the 5,000 signatures required by the Charter for processing a proper initiative petition.

The initiative proposal was in the form of a resolution which read as follows:

> "Be It Resolved by the People of the City of Cleveland That:
>
> The President of the United States Should Bring All American Troops Home From Vietnam Now So That the Vietnamese People Can Settle Their Own Affairs."

After consulting with legal counsel who informed her that the proposed resolution violated the initiative provisions of both the Ohio Constitution and the City Charter, respondent notified petitioners that their proposed resolution could not be legally processed and offered to return all documents to the petitioners.

Stipulations have been agreed upon to support the authenticity of all pertinent Charter sections referred to in this brief. The parties have also agreed as to the text of the four resolutions relating to non-municipal matters adopted by the City Council during the past twenty years. (See appendix to petitioners' brief, pages 1a to 7a and 9a to 11a.)

As will be brought out in later argument, it is important to recognize that in *each* instance the above-referred to resolutions were introduced and sponsored by

individual members of the City Council. *They were not presented to the Council by way of initiative petition.*

The question of the power of the City Council to adopt such resolutions is *not* before the Court in this case. The only question to be considered is whether or not the electors of the State of Ohio and the City of Cleveland who adopted the applicable constitutional and Charter provisions authorized the use of the initiative with respect to informal enactments in resolution form dealing with matters beyond the scope of municipal control.

V.

ARGUMENT.

REASONS WHY THE WRIT SHOULD BE DENIED.

In order to interject a federal question into this case, petitioners have constructed a "straw man" whose very existence evaporates with an analysis of either Section 1f, Article II of the Ohio Constitution relating to the initiative and referendum powers of a municipality or Sections 49 through 62 of the Charter which set forth the manner in which the people of Cleveland have chosen to exercise this power. Applying either the constitutional or the Charter standard, the petitioner's position is untenable.

1. A proposed initiative resolution relating to the war in Vietnam does not pertain to any matter which a municipality has the power to regulate by legislative action. Therefore, under the Constitution of the State of Ohio, such resolution is not the proper subject for exercise of the initiative.

Section 1f, Article II of the Ohio Constitution is the only provision of that constitution which refers to the municipal initiative. It was interpreted by the Supreme Court

of Ohio in *State, ex rel. Rhodes v. Bd. of Elections, supra,* which case was pending before that court at the same time as the instant matter. The legislation proposed in such case was almost identical in form to resolution proposed by petitioners. In disposing of the matter, the court stated:

> "Section 1f, Article II of the Ohio Constitution provides for municipal initiative and reads as follows:
>
> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which *such municipality may* now or hereafter *be authorized by law to control by legislative action;* such powers may be exercised in the manner now or hereafter provided by law." (Emphasis the Court's.)
>
> "The initiative petition in the instant case does not contain any question which a municipality is authorized by law to control by municipal action."

As background reference to Ohio law on the subject, Article II, Section 1f of the Ohio Constitution was adopted at the same time as Sections 3 and 7 of Article XVIII of the Ohio Constitution.[1] Therefore, they should under past decisions of this Court be reconciled in a way that would give meaning and substance to all of the provisions.

In effect Article II, Section 1f says that the people in each municipality reserve the use of the initiative and referendum on matters which municipalities may now or hereafter be authorized by law *to control* by legislation.

---

[1] Article XVIII, § 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Article XVIII, § 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Section 3 of Article XVIII prescribes that municipalities shall have all powers—*and therefore control*—of local self-government including such police, sanitary and other similar regulations as are not in conflict with the general laws of the state—the fields of incurring debt and levying taxes and assessments are subject to separate constitutional regulations not pertinent to the instant matter.

Section 7 of Article XVIII permits a municipality to adopt a Charter *to control the exercise of the home rule powers* flowing directly from Section 3 of Article XVIII.

The scope of the powers of local self government of a municipality has been established and adhered to since the earliest of the home rule cases in Ohio and it is not respondent's intent to deluge the Court with citations on the subject. The law is explicitly set forth in the early case of *Fitzgerald v. Cleveland,* 88 Ohio St. 338 (1913) where the opinion states at page 344:

> "As to the scope and limitations of the phrase 'local self government,' it is sufficient to say here that the powers referred to are clearly such as involve the exercise of the functions of government, *and they are local in the sense that they relate to the municipal affairs of the particular municipality.*"

In *Village of Beachwood v. Board of Elections,* 167 Ohio St. 369 (1958), The Ohio Supreme Court more recently reiterated its position that the power of local self government granted to municipalities by Section 3 of Article XVIII of the Ohio Constitution relates solely to the government and administration of the internal affairs of the municipality.

Finally a case quoted extensively by petitioner, both here and in the court below, *State, ex rel. Sharp v. Hitt,* 155 Ohio St. 529 (1951), recognizes the limitations of the initiative in the third paragraph of the syllabus as follows:

"3. The electors of a municipality may by the initiative enact a measure conflicting with or repealing legislation previously passed by the municipal council, *so long as the subject matter of such initiative ordinance is within the powers of the municipality to control by legislative procedure.*"

In harmony with the aforecited limitations is a decision illustrating the absence of municipal control over national issues, *City of Cleveland v. Piskura*, 145 Ohio St. 144 (1945). The first three paragraphs of the syllabus read:

"1. Section 8, Article I of the Constitution of the United States grants to Congress the Exclusive power to declare and levy war.

"2. By virtue of the power granted by Section 8, Article I of the federal Constitution, Congress is vested with exclusive authority to enact all legislation in the interest of the national defense and necessary to the effective prosecution of war.

"3. *Where Congress has enacted, as a war measure, legislation upon a subject matter which is national in character and can be governed only by a uniform system, this state (or its political subdivisions), in the absence of express consent by Congress, is without authority, by way of complement to the legislation of Congress, to prescribe additional regulations which the state may deem auxiliary provisions for the same purpose.*"

Respondent therefore contends that Article II, Section 1f of the Ohio Constitution gives the right of initiative only over those matters which a municipality is authorized by law to control by legislative action. Section 3 of Article XVIII restricts municipal legislative control to those matters relating to local self government. In turn this latter term has been limited by the Ohio Supreme Court as

applying solely to the government and administration of the local affairs of the municipality.

The construction of state law by a state court has been accepted as binding by this Court. *United States v. Burnson,* 339 U. S. 87 (1950).

Since the Ohio Constitution specifically limits the use of the initiative process to matters of local nature, the respondent had no authority to accept an initiative resolution dealing with federal, not local, subject matter and expend local taxpayers' money to process it. Thus, her refusal deprived petitioners of no right granted or protected under the laws of Ohio or the Fourteenth Amendment to the United States Constitution.

2. The people of Cleveland in adopting their Charter have recognized the basic distinction between an ordinance and a resolution and have chosen to limit the application of the initiative procedure to those matters which would be the proper subject for legislation in ordinance form.

The Ohio Supreme Court considered the limitation placed upon the use of the initiative in Section 1f of Article II of the Ohio Constitution to be dispositive of the case and for that reason did not find it necessary to remark upon the limitations on the use of the initiative set forth in the Charter. *With this conclusion respondent agrees.* However, petitioners did refer extensively to both the Charter provisions and sections of the Revised Code of Ohio in their brief; and though respondent considers such arguments to be totally without merit, she is obligated to comment on them.

In analyzing the problem before the Court one must recall that the legislative function of a municipal legislative body is normally performed in one of three ways,

by ordinance, by resolution or by motion. The latter mode is in most instances a part of the body's parliamentary procedure used for the orderly and expeditious conduct of the Council's business and is not pertinent to the instant case.

Of primary importance, however, is the fundamental distinction that exists between an ordinance and a resolution. An ordinance relates to a formal written enactment by a municipal legislative authority in the exercise of governmental power vested by the Constitution and Charter *for the general regulation of its citizens* or other *matters subject to its control* and intended to be of *permanent duration.* By contrast a resolution is an informal written enactment by the legislative authority *disposing of a particular item of business* and *not prescribing any permanent rules of conduct. Wuebker v. Hopkins,* 29 Ohio App. 386 (1928); *State, ex rel. City of Mansfield v. Lowery,* 32 Ohio Ops. 2d 481 (1964); *W. B. Gibson Co. v. W. M. Housing Authority,* 65 Ohio App. 84 (1940); *Campbell v. Cincinnati,* 49 Ohio St. 463 (1892).

An examination of the initiative provisions of the Charter discloses very clearly that the people of the City of Cleveland in enacting these sections chose to limit their application solely to enactment of local regulations of a general and permanent character, namely, ordinances. *Not once* in the 14 sections of the Charter relating to the initiative and referendum is the term resolution used (see appendix to petitioner's brief, pages 2a to 7a). The only legislative reference is to a proposed ordinance. For example:

Section 49 commences with the sentence:

"*Any proposed ordinance* may be submitted to the council by petition signed by at least five thousand (5,000) qualified electors of the city. * * *"

Section 54 states in part:

"When the certificate of the clerk shows the petition to be sufficient, he shall submit *the proposed ordinance* to the council at its next regular meeting and the council shall at once read and refer the same to the appropriate committee, * * *. Provision shall be made for a public hearing on the *proposed ordinance* * * *. Thereafter the committee shall report the *proposed ordinance* to the council with 'its recommendations thereon, not later than sixty days after the date on which the *proposed ordinance* was submitted to the council by the clerk.' "

Section 55 refers to the form on the initiative in this way:

"Upon receiving the *proposed ordinance* * * *. If the council reject the *proposed ordinance* * * *."

Section 56 provides in part:

"When *an ordinance* proposed by a petition is to be submitted to a vote of the electors the committee of the petitioners shall certify that fact and the *proposed ordinance,* * * *."

Section 57 as it pertains to the form of initiative legislation requires:

"Upon receipt of the certified copy of the *proposed ordinance,* * * *. * * * such *proposed ordinance* shall be submitted to a vote of the electors. If no such election is to be held within the time aforesaid, the council may provide for submitting the *proposed ordinance* to the electors. * * *."

Section 58 requires:

"*Proposed ordinances* for repealing any existing *ordinance or ordinances* in whole or part may be submitted to council as provided in the preceding sections *for initiating ordinances. Initiated ordinances* adopted by the electors shall be published and may

be amended or repealed by council as in the case of any other *ordinance.*"

Section 62 reads:

"*Ordinances submitted to council by initiative petition* and passed by council without change, or passed in an amended form and not required to be submitted to a vote of the electors shall be subject to the referendum in the same manner as other *ordinances.*"

Note the contrast with the wording of Sections 32 and 33 of the Charter (Appendix to petitioner's brief, pages 1a and 2a), the pertinent parts of which read:

"§ 32. Legislative Procedure.

"* * * The vote upon the passage of all *ordinances,* and upon the adoption of such *resolutions* as the council by its rules shall prescribe, shall be taken by 'yeas' and 'nays' and entered upon the journal."

"§ 33. Ordinance Enacted.

"*Ordinances and resolutions* shall be introduced in the council only in written or printed form. All *ordinances or resolutions,* except *ordinances* making appropriations, shall be confined to one subject which shall be clearly expressed in the title, except as provided in the next section. *Ordinances* making appropriations shall be confined to the subjects of appropriation. *No ordinance shall be passed until* it has been read on three separate days unless the requirement of reading on three separate days has been dispensed with by a two-thirds vote of all the members of the council. The final reading shall be in full unless a written or printed copy of the measure shall have been furnished to each member of the council prior to such reading. The enacting clause *of all ordinances passed* by the council shall be 'Be it ordained by the council of the city of Cleveland.' *The enacting clause of all ordinances submitted by the initiative shall be 'Be it ordained by the people of the city of Cleveland.'*"

Respondent could have enumerated numerous other sections of the Charter where the same care was taken in distinguishing between ordinances and resolutions as is evidenced in Sections 32 and 33. However, she believes that these two sections make the required point of distinction especially when one considers the fact that they were adopted by the people of Cleveland at the same time as the previously mentioned sections on the initiative and referendum where reference to resolutions was carefully excluded.

The Court's attention is directed to an Ohio decision directly in point which supports the contention of respondent. In *James, on behalf of City of Columbus v. Ketterer*, 125 Ohio St. 165 (1932) the first paragraph of the syllabus reads:

> "The City Charter of the City of Columbus does not provide for the submission of a resolution by initiative petition, nor for its submission to a referendum."

The above paragraph of the syllabus is elaborated upon in the opinion at pages 168 and 169 as follows:

> "When a city council contemplates an improvement, the introductory legislation is the passage of a resolution of necessity. Defendants insist that the city charter makes ample provision for the initiative and referendum on resolutions. A careful examination of the city charter does not sustain this contention. Sections 36 to 47, inclusive, contain all the provisions relative to the initiative, and Sections 49 to 52, inclusive, are the referendum sections.
>
> "All of these sections are specific. They deal with ordinances and not resolutions. *Defendants insist that the word 'ordinance' as used in the charter is generic and includes 'resolution.' If such were the legislative intent we would have to so hold; but giving to this charter the most liberal construction, considering*

context, subject-matter, and the reason for the law, we fail to find such legislative intent. Rather we find the converse. Resolutions seem to have been studiously avoided. *There is a vast difference between an ordinance and a resolution, and we must assume that the lawmaking body of the city must have had this difference in mind when the city charter was adopted.*

"Counsel on both sides insist that the doctrine of '*Expressio unius est exclusio alterius*' applies in this case, and this court is in complete accord with that contention. Ordinance is expressed; resolution is not; consequently, because of the marked legal distinction between them, *we must conclude that by expressing ordinances, resolutions were excluded,* and that neither the initiative nor referendum as provided for in the charter applies."

Reiteration of the same principle of exclusion may be found in *State, ex rel. Devine v. Hoermle,* 168 Ohio St. 461 (1959) wherein court stated at page 462 of the opinion:

"*Section 5 of the Columbus charter grants the power to fill vacancies to council and to no one else. Applying the doctrine of expressio unius est exclusio alterius, as we did in State, ex rel. Bindas v. Andrish, supra* (165 Ohio St. 441), it is apparent that the charter denies such power to the mayor. It necessarily follows that the statute giving the mayor such power under certain circumstances conflicts with section 5 of the charter."

Finally the answer to petitioners' contention that Sections 731.28 and 731.41 [1] of the Revised Code of the State

---

[1] 731.28 Ordinances and measures proposed by initiative petition.

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. * * *

(Continued on following page)

of Ohio have application here is found in *Dillon v. City of Cleveland,* 117 Ohio St. 528 (1927), wherein it is stated beginning on page 272 of the opinion:

> "The Cleveland Charter is not of general nature and has local application to the City of Cleveland alone. *The power of charter cities to make charter provisions regulating the manner of the exercise of the referendum does not in any sense depend upon the exemptions stated in Sec. 4227-12 (now Sec. 731.41 R. C.).* That section is merely a legislative recognition of constitutional limitation upon its own power. *The real power of charter cities is referable to Sections 3 and 7 of Article XVIII of the Ohio Constitution.*"

The court elaborated further at page 276 of the opinion as follows:

> "* * * Quite uniformly, and, so far as we have been able to ascertain without exception, the courts of those states having municipal charters with powers of local self-government have declared that a city charter enacted by the voters of a municipality is a *'law'* as much as if it were enacted by the Legislature of the state."

Further refutation of petitioners' argument as to the application of Sections 731.28 and 731.41 of the Revised Code of Ohio is found in Section 1 of the Charter which is entitled "General Powers." Section 1 describes the various and sundry corporation functions of the City of Cleveland and then ends with this clause:

> "and all such powers whether expressed or implied, shall be exercised and enforced in the manner pre-

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(Continued from preceding page)

731.41 Charter municipal corporations.

Sections 731.28 to 731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures.

scribed in this charter, *or when not prescribed herein, in such manner as shall be approved by ordinance or resolution of Council.*"

Section 2 of the Charter is entitled "Enumeration of Powers Not Exclusive" and provides:

> "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive but, in addition to the powers enumerated herein, implied thereby, or appropriate to the exercise thereof, the City shall have, and may exercise all other powers which under the constitution and laws of Ohio, it would be competent for this charter to specifically enumerate."

Sections 1 and 2 of the Charter have been in effect since January 1, 1914 and are still in their original form, having withstood the test of several Charter revisions. Thus they must and should be read in *pari materia*. In reading such provisions, it must be remembered that Section 3 of Article XVIII of the Ohio Constitution, not the State Legislature, is the fountain head of municipal power in Ohio. *State, ex rel. Devine v. Hoermle, supra.* The Charter as adopted by the people of Cleveland acts as an instrument for the limitation or distribution of this constitutional power. State statutes governing the initiative are applicable only in those municipalities whose people have elected to exercise a constitutional option of adopting a statutory rather than a charter procedure with respect to the initiative.

Predicated on this foundation, it becomes obvious that the meaning of Sections 1 and 2 of the Charter is *not* as petitioners claim, namely, that where a provision of power is absent, it should be read into the Charter if competent to be so read under state law. What the sections *do* mean is that where an action is not specifically

controlled in the Charter, yet is within the realm of municipal power, it may be exercised in the manner prescribed by ordinance or resolution of Council.

Therefore, petitioner's argument that Section 731.28 of the Revised Code of Ohio, which provides that ordinances *and other measures* relating to municipal power may be proposed by initiative, must be impliedly read into the initiative provisions of the Charter is untenable even without reference to Section 731.41 of the Revised Code which excludes Charter municipalities from the operation of Section 731.28 of the Revised Code.

It follows, therefore, that respondent did not violate any duty required of her by Charter[1] and thereby deprive petitioners of any right protected by Amendment XIV of the United States Constitution by refusing to process an initiative resolution relating to the conduct of the war in Vietnam.

3. The record presents no evidence to substantiate a claim that respondent violated any principle of uniformity protected by Amendment XIV of the United States Constitution.

In order to establish arbitrary discrimination inimical to the rights protected under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, the record must disclose some act on the part of respondent that amounts to violation of an essential principle of practical uniformity.

---

[1] § 31. Clerk.

The Council shall choose a clerk and such other officers and employees of its own body as are necessary. The clerk shall keep the records of the council and perform such other duties as may be required by this charter or by the council. All such officers and employees chosen by the council shall serve during the pleasure thereof.

In this case there is absolutely no evidence that there ever has been a prior attempt to process an initiative resolution of any type in the City of Cleveland, let alone one that refers solely to a question beyond municipal control. Under such circumstance, the initiative resolution presented by petitioners must be considered as a matter of first instance so that there can be no issue of the uniformity of respondent's conduct involved. The only question revolves around an interpretation of Section 1f, Article II of the Ohio Constitution and the various Charter provisions hereinbefore cited. Such interpretation is a matter for the state courts and not a proper basis for review by this Court. *United States v. Burnson (supra).*

The facts here are readily distinguishable from the ones before the Court in *Cox v. Louisiana,* 379 U. S. 536 (1965), cited by petitioners. In the *Cox* case, the evidence clearly established that Baton Rouge authorities had not applied a statute which on its face precluded all street assemblies and parades in a uniform manner. From the record it appeared that such officials permitted or prohibited parades or meetings in completely uncontrolled discretion. Certainly such facts are not analogous to the situation in this case.

Apparently recognizing this distinction, petitioners insert into their reasoning the unsupported proposition that under the Constitution of the State of Ohio and the Charter of the City of Cleveland, legislation originating by way of the initiative extends to the same range of subject matter as legislation originating in the legislative forum. They then contrast the action of respondent with a few previous enactments of city council and attempt to infer discrimination on this basis.

The fallacy of this argument is that the people in enacting both their state Constitution and the Charter of the

City of Cleveland, chose not to grant to the municipal initiative the same legislative prerogatives inherent in the City Council. The constitution limited such initiative to questions which municipalities were authorized to control by law and left any further refinements to the people of a charter municipality. The electors of the City of Cleveland in adopting their Charter further limited the use of the initiative to those matters of a permanent nature which were a proper subject of the ordinance form of legislation. At page 10 of their brief, petitioners concede that such power perhaps exists and with this conclusion respondent agrees.

CONCLUSION.

In our ever evolving society, the complexities of a modern, urban government have been constantly increasing. Apparently the people of the State of Ohio and the City of Cleveland were cognizant of this propensity years ago when they chose to limit the use of the initiative process at the municipal level to those matters relating to local self government which affected the permanent machinery of city government.

Quite properly they recognized that the interjection of national and international questions into municipal elections would tend to obscure the local issues which so intimately affect the daily existence of a community. The people appreciated that a proper forum in which to debate the former matters would be available to them in their Congressional and Presidential elections when the federal policy makers made their accounting to the electorate.

Therefore, respondent respectfully submits that certiorari should be denied for the reason that no legitimate issue involving the application of the Equal Protection

clause of the Fourteenth Amendment is presented by the facts in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.
No. 1035.

STATE OF OHIO,
On the relation of
FRANKLIN ANDERSON, *et al.*,
Petitioners,

vs.

MERCEDES COTNER,
Clerk of Cleveland City Council, *et al.*,
Respondents.

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO,

In Support of Petition for Writ of Certiorari To the Supreme Court of Ohio.

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TABLE OF CONTENTS.

Statement of the Case 1

Questions Presented 3

Reasons for Granting This Writ 3

I. Denial by a City Official of the Use of the Initiative Procedures for the Purpose of Proposing a Resolution of Opinion Violated Petitioners' Rights of Free Speech, Press and the Right of Petition 3

A. The First Amendment Freedoms at Stake Here 3

B. The First and Fourteenth Amendments Prohibit Respondent From Denying Petitioners the Exercise of Their First Amendment Rights 7

II. Refusal of a City Official to Accept and Process Petitioners' Initiative Denied Petitioners the Equal Protection of the Laws 8

III. This Case Presents This Court With the Opportunity to Decide Basic Questions Concerning the Nature of the Legislative Power Which Is Inherent in the People and Whether They Can Exercise This Power Through the Initiative Machinery Which They Have Established in Their State Constitutions and Municipal Charters 9

IV. The Temper of Our Times Requires That This Court Protect Every Area of Lawful Public Expression From Abridgement So That These Areas Shall Remain Available to the People 10

Conclusion 12

TABLE OF AUTHORITIES.

Cases.

Bates v. Little Rock, 361 U. S. 516 (1960) ---------- 4

DeJonge v. Oregon, 299 U. S. 353 (1936) ---------- 4

Hague v. C.I.O., 307 U. S. 496 (1939) ---------- 4, 7

Lamont v. Postmaster General, 381 U. S. 301 (1965) 8

Shelton v. Tucker, 364 U. S. 479 (1960) ---------- 4

Spriggs v. Clark, 45 Wyo. 62, 14 P. 2d 667 (1932) --- 5

United States v. Cruikshank, 92 U. S. 542 (1876) --- 4

Constitutions.

Constitution of Ohio:

Art. I, Sec. 2 ---------- 9

Art. II, Sec. 1f ---------- 9

Constitution of the United States:

First Amendment ----------2, 3, 4, 7, 8

Fourteenth Amendment ----------2, 3, 4

Other.

Chaffee, *Free Speech in the United States*, p. 361, Harvard University Press (1941) ---------- 11

Cleveland Charter ---------- 2, 4

Cooley, *Constitutional Limitations*, Vol. I, p. 728 (8th Ed.) ---------- 10

McQuillin, *Municipal Corporations*, Vol. 5 (3d Ed.), page 521 ---------- 6

Meiklejohn, *Political Freedom*, New York, Oxford University Press (1965), page 75 ---------- 11

Proceedings and Debates, Ohio Constitutional Convention, Minutes of March 19, 1912, p. 751 ---- 6

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BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO, In Support of Petition for Writ of Certiorari To the Supreme Court of Ohio.

Petitioners and respondents have consented to the filing of this brief.

STATEMENT OF THE CASE.

On August 29, 1967, petitioners submitted to the respondent, Mercedes Cotner, Clerk of Cleveland City Council, an initiative petition containing the following resolution:

> "Be it resolved by the people of the City of Cleveland that:
>
> THE PRESIDENT OF THE UNITED STATES SHOULD BRING ALL AMERICAN TROOPS HOME FROM VIETNAM NOW SO THAT THE VIETNAMESE PEOPLE CAN SETTLE THEIR OWN AFFAIRS." (Petitioners' Appendix 7a, 8a.)

In support of their initiative resolution, petitioners obtained 9,954 signatures from Cleveland citizens (Petitioners' Appendix 8a). This was nearly twice the number required by Section 49 of the Cleveland Charter (Petitioners' Appendix 2a).

On August 31, 1967, the respondent Clerk of Council refused "* * * for legal reasons to process the petitions * * *" (Petitioners' Appendix 8a).

On September 5, 1967, petitioners filed a mandamus action in the Supreme Court of Ohio to require the respondent Clerk to ascertain the sufficiency of their petition and to certify it to the City Council as required by Sections 51 and 54 of the Cleveland Charter (Petitioners' Appendix 3a, 4a).

The Ohio Supreme Court denied a writ of mandamus on October 6, 1967, and on October 25, 1967, denied petitioners' motion for reconsideration (Petitioners' Appendix 14a).

Petitioners are now before this Court asserting that the respondents' action has denied them First Amendment rights of free speech and press and the right to petition for a redress of grievances, as well as the equal protection of the law guaranteed by the Fourteenth Amendment.

QUESTIONS PRESENTED.

I.

Where Cleveland City Council, the municipal representative of the people of Cleveland, pursues a longstanding practice of adopting resolutions concerning all manner of issues, including directives to the President of the United States with respect to national foreign policy, and where a group of citizens of the City of Cleveland present a procedurally valid petition to the Clerk of the Council containing a resolution petitioning the President to change the policy of this Nation concerning its prosecution of the war in Vietnam and where such Clerk refuses to certify such petition to the Council for its acceptance or rejection, is there an abridgement of the rights of free speech, press and the right to petition as guaranteed by the First and Fourteenth Amendments to the United States Constitution?

II.

In a situation as described in I, are petitioners denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

REASONS FOR GRANTING THIS WRIT.

I.

DENIAL BY A CITY OFFICIAL OF THE USE OF THE INITIATIVE PROCEDURES FOR THE PURPOSE OF PROPOSING A RESOLUTION OF OPINION VIOLATED PETITIONERS' RIGHTS OF FREE SPEECH, PRESS AND THE RIGHT OF PETITION.

A. The First Amendment Freedoms at Stake Here.

Ours is a government republican in form and representative in character. To insure its effective functioning, the framers of our national constitution elevated to a preferred position the freedom to engage in debate, to publish

opinions concerning political issues, and to petition elected representatives with respect to grievances. United States Constitution, Amendment I. This Court has often noted the fundamental importance of these freedoms in a democratic society. *Shelton v. Tucker,* 364 U. S. 479 (1960); *Bates v. Little Rock,* 361 U. S. 516 (1960); *DeJonge v. Oregon,* 299 U. S. 353 (1936).

When the petitioners circulated their petition containing a resolution of opinion on a vital national issue, they were exercising their constitutional right of free speech. The use of a petition, moreover, brought their action within the ambit of the freedom to publish opinions.

But most important is that petitioners' petition was a petition for the redress of grievances directed to our National Government concerning its policy in Vietnam.

The First Amendment explicitly declares that this type of activity is not subject to governmental abridgement. This Court has said that the right to petition is

> "an attribute of national citizenship and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form, implies a right of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank,* 92 U. S. 542 (1876).

By the Fourteenth Amendment state governments are precluded from abridging this right to petition. *Hague v. C.I.O.,* 307 U. S. 496 (1939).

Cleveland's Council may adopt, alter or reject the petitioners' resolution. If it rejects or changes it, petitioners can require that it be submitted to the electorate of Cleveland. Section 55, Cleveland Charter (Petitioners' Appendix 4a).

Submission of a question of opinion to an electorate by placing it on the ballot for their approval or rejection has been squarely held to constitute a petitioning for the redress of grievances within the meaning of the First Amendment. In *Spriggs vs. Clark*, 45 Wyo. 62, 14 P. 2d 667 (1932), the Wyoming Supreme Court considered a resolution of that state's legislature requiring the Wyoming Secretary of State to submit to the electorate the question whether the Eighteenth Amendment to the United States Constitution should be repealed.

An injunction was sought to prohibit placing the question on the ballot. It was argued that it would require the unlawful use of tax revenues, that there was not any constitutional or statutory basis for it, and that neither the people of Wyoming nor their legislative representatives could effect the repeal themselves.

In rejecting these contentions, the Wyoming Court stated:

> "It is within the judicial knowledge of this Court that our state legislature has in the past repeatedly, by resolutions duly adopted, memorialized and petitioned Congress concerning dozens of subjects on which that body had power to legislate and in which the citizens of this state have been deeply interested. No one * * * has ever questioned the propriety of so doing." 14 P. 2d 672, 673.

Continuing, the Court concluded:

> "The effect of the resolution now before us is but to present to Congress a memorial, a petition from the people of this state as a whole, expressing their opinions regardless of whether they be for or against the repeal of the Eighteenth Amendment. *If the people's representatives may petition Congress*, as has so frequently been done, in light of the quoted clauses of the state and national fundamental laws, *it is diffi-*

cult to see why the people themselves may not do so * * *." (Emphasis added) 14 P. 2d 673.

Furthermore, it appears that the framers of Ohio's constitution may have foreseen this use of the initiative. In constitutional debate State Senator Theodore E. Burton explained the purpose of the initiative and referendum in this manner:

> "*They provide a method for a test of public judgment upon any question which is of interest to a considerable number of citizens.* Such a test is often denied in a legislative body by the pressure of business, the complexities of parliamentary procedures, or the undue influence of party leaders or powerful interests." *Proceedings and Debates, Ohio Constitutional Convention,* Minutes of March 19, 1912, p. 751. (Emphasis added.)

Whether Senator Burton's remarks flowed from foresight or not, their pertinence here is clear. The initiative power is usually broad. *McQuillin* in his work, *Municipal Corporations,* Vol. 5 (3d Ed), says at page 521:

> "The power of initiative and referendum may be conferred by the sovereignty upon a municipality with respect to any matter, legislative or administrative, within the realm of local affairs; and *often the power, as conferred, is extensive, including all ordinances and resolutions and practically all actions that might be taken by a municipal council.*" (Emphasis added.)

The decision below of the Ohio Supreme Court is a flat denial and, therefore, an abridgement of petitioners' fundamental First Amendment rights. This Court should grant its Writ of Certiorari to insure that the freedom of petitioners and others to petition their National Government in this manner will be protected.

B. The First and Fourteenth Amendments Prohibit Respondent From Denying Petitioners the Exercise of Their First Amendment Rights.

Section A shows that the right to exercise First Amendment Freedoms is at stake here. This section shows that a state may not abridge the exercise of these freedoms.

Initiative procedures, like public buildings, grounds, and the postal system are maintained for public use by the state governments. These governments may not limit the use of these public facilities so that First Amendment Freedoms are abridged.

To illustrate: streets are maintained by governments for the primary purpose of facilitating the flow of traffic, and commerce. However, the streets also lend themselves to the exercise of the First Amendment Freedoms of free speech, publicly assembling to discuss public matters and of petitioning for a redress of grievances. The same may be said for public parks.

While it is clear that governments may reasonably regulate the use of streets and parks they may not do so in a manner that abridges those freedoms.

> "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not in the guise of regulation, be abridged or denied.*" *Hague v. C.I.O.*, 307 U. S. 496 (1939). (Emphasis added.)

The same principle applies here. Cleveland may reasonably regulate the use of the initiative, but it may not

abridge the right of the people of Cleveland to use it to exercise their First Amendment Freedoms.

The postal system furnishes a further analogy. It is settled that the use of the mails may not be separated from free speech.

> "The United States may give up the post office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues." *Lamont v. Postmaster General,* 381 U. S. 301 (1965).

This Court would not sanction an attempt by the post office to prevent the circulation of petitioners' petition through the mails. Nor should it sanction respondents' refusal to permit its circulation to the council and perhaps the electorate of Cleveland through the initiative process. The people of Ohio can repeal the reservation of the right of initiative when they choose to do so, but until they have done so, it is in an area protected by the First Amendment.

For all these reasons, then, this Court should grant its Writ of Certiorari to review the judgment below.

II.

REFUSAL OF A CITY OFFICIAL TO ACCEPT AND PROCESS PETITIONERS' INITIATIVE DENIED PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

When the respondent clerk refused to certify petitioners' initiative petition, she arbitrarily denied them the equal protection of their constitutional right to exercise their inherent legislative power through the initiative procedure.

In their Petition, petitioners have demonstrated that since the Cleveland Council has the power to propose and adopt resolutions similar to that proposed by petitioners,

and since there exists a method by which the people can exercise the same prerogative, Cleveland may not frustrate the right of the people to take similar action. Such an anomaly may not exist.

Because of the Equal Protection principle, petitioners' initiative deserves a broad interpretation of the declarations that all political power (and necessarily, legislative power) is "inherent in the people" and that the initiative is "reserved to the people of each municipality." Ohio Constitution, Article I, Section 2 and Article II, Section 1f (Petition 3).

III.

THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO DECIDE BASIC QUESTIONS CONCERNING THE NATURE OF THE LEGISLATIVE POWER WHICH IS INHERENT IN THE PEOPLE AND WHETHER THEY CAN EXERCISE THIS POWER THROUGH THE INITIATIVE MACHINERY WHICH THEY HAVE ESTABLISHED IN THEIR STATE CONSTITUTIONS AND MUNICIPAL CHARTERS.

This case offers this Court a unique opportunity to make effective the right of the people to use their initiative procedures for the vital purpose of expressing their opinions on important national political issues. Although national in character, these issues affect the local affairs of each community in the United States. At present the Vietnam issue affects every neighborhood in America in which young men live. By granting the writ of certiorari this Court can insure adequate consideration of the issues surrounding this exercise of political power and freedom.

IV.

THE TEMPER OF OUR TIMES REQUIRES THAT THIS COURT PROTECT EVERY AREA OF LAWFUL PUBLIC EXPRESSION FROM ABRIDGEMENT SO THAT THESE AREAS SHALL REMAIN AVAILABLE TO THE PEOPLE.

In this time of rising tensions, street demonstrations increasingly result in violent clashes between persons of different persuasions and between policemen and demonstrators. Areas of lawful public expression must be kept open to the people who wish to express their grievances peaceably and within the law. The value of the petition for a redress of grievances in this connection has long been recognized. *Cooley* says it is:

> "a sacred right which in difficult times shows itself in full magnitude, frequently serves as a safety-valve if judiciously treated by the recipients, and may give to the representatives or other bodies the most valuable information. Cooley, *Constitutional Limitations*, Vol. I, p. 728 (8th Ed).

This is a time, too, when the fear is often expressed that government is too far removed from the people. Petitioning for a redress of grievances offers the people a chance to participate more directly in their government. And it gives them an opportunity to participate more frequently than the periodic elections of representatives allow.

Furthermore, the initiative process has peculiar virtues as a method of petitioning for a redress of grievances. The voter indicates his opinion in the privacy of the voting booth. He is free from any duress or coercion; his vote in anonymous. It may be, therefore, most truly his own opinion. The results of the petitions are known with an exactitude not possible in other methods of petitioning.

Finally, if petition by initiative is barred there is a loss to society of valuable public discussion of important national issues. Nothing stimulates public discussion in this country so much as elections do. Placing this resolution before Cleveland Council and perhaps the electorate of Cleveland would stimulate much valuable discussion in Cleveland. The electorate would seek to inform itself on the issue. Proponents and opponents would seek to influence opinion on the question. Public understanding of the issue would increase.

It has been said that:

> "The First Amendment is not, primarily, a device for winning of new truth, though that is very important. It is a device for sharing whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." Meiklejohn, *Political Freedom,* New York, Oxford University Press (1965), page 75.

In addition, in a representative government, it is essential that the representatives be informed of the desires of the citizens they represent. This is a part of our society. Groups of every size and nature seek to make their views known to legislators and executive officers. It is well that they do so, for

> "* * * [s]tatutes, to be sound and effective, must be preceded by abundant printed and oral controversy. Discussion is really legislation in the soft." Chaffee, *Free Speech in the United States,* p. 361, Harvard University Press (1941).

The same may be said of policy.

CONCLUSION.

Fundamental freedoms crucial to our democratic society are at stake here. Unique questions concerning the inherent political power of the people are involved. The stress of the times requires that this Court preserve inviolate the reserved and guaranteed rights of the people to political expression.

To resolve these issues this Court should grant its Writ of Certiorari.

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